

EPC COMMISSION MINUTES & AGENDA

MONTH October

YEAR 1986

ADM-1-1-1
October

MEETING AGENDA
ENVIRONMENTAL PROTECTION COMMISSION
WALLACE STATE OFFICE BUILDING
DES MOINES, IOWA

October 27-28, 1986

Meeting Convenes at 8:30 a.m.

Break 10.00 a.m.

Public Participation 10:30 a.m.

- 1. Adoption of Agenda.
2. Adoption of Minutes
3. Environmental Monitoring and Laboratory Services Contract (Kuhn) Decision.
4. DNR Budget for FY 87 and Budget Request for FY 88. (Kuhn) Information.
5. Proposed DNR Organizational Rules, Chapter 1--Description of Organization. (Combs) Informational.
6. Notice of Intended Action--Chapter 2, Public and Confidential Information. (Combs) Decision.
7. Notice of Intended Action--Chapter 3, Submission of Information and Complaints--Investigations. (Combs) Decision.
8. Referral Process. (Combs) ~~Informational.~~
Decision
9. Referrals to Attorney General's Office. (Combs)
~~Informational.~~
Decision
10. Proposed Contested Case Decision--Walter H. Reinholdt. (Combs) Informational.
11. Stan Larsen appeal of Proposed Decision. (Combs) Decision.
12. Draft Plan for Hazardous Waste Storage Facility. (Combs) Informational
13. Final Rule--Chapter 151, Hazardous Waste Sighting Criteria. (Stokes) Decision

14. Groundwater Protection Strategy Plan Update. (Combs) Informational
15. Monthly Reports. (Stokes) Informational.
16. Contract for Testing Public Water Supplies for Pesticides and Synthetic Organic Compounds. (Stokes) Decision
17. Rule Revision--Chapter 69, Onsite Wastewater Treatment and Disposal Systems. ~~(Combs) Informational.~~
(Stokes) Decision.
18. Final Rule--Chapter 135, Underground Storage Tank Regulations. (Stokes) Decision.
19. Toxic Clean-Up Days Preliminary Report (Stokes) Informational
20. Other DNR Legislation Proposals. (Fagerland) Informational.
21. Address Items for Next Meeting

NEXT MEETING DATES

November 12-13, 1986
December 15-16, 1986

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PRELIMINARY ONLY

PROCEDURES FOR HANDLING REFERRALS TO THE ATTORNEY GENERAL

INTRODUCTION

This is the procedure for handling cases that the director is requesting the Commission refer to the Attorney General's Office for litigation. The procedure is simple and straightforward, for several reasons. First, it should be readily understandable to the director, the Commission, and the affected public. Second, a complicated procedure provides more opportunities for technical procedural objections by the participants. Third, a complicated procedure leads toward formal proceedings, which are not consistent with the Commission's desire to be accessible to all Iowans. Finally, the applicable statutes do not provide for or require a formal evidentiary hearing before the Commission can refer a case to the Attorney General's Office.

BACKGROUND

There are a number of factors which affect the director's presentation of a case and which should be considered. First, most records and documents in the possession of the Department are by law open to public inspection. That means that persons to be brought before the Commission for referral have access at any time to the documentary evidence the director possesses. However, the director does not have similar access to documentary evidence possessed by the alleged violator (except when the alleged violator is a governmental body). Unless the Department has instituted a contested case and obtained documents by subpoena, the director will have at the time a case is presented only the information the director has observed or collected, or heard from the alleged violator or witnesses. The Commission should not be surprised when the information the director presents does not include everything the alleged violator may bring-up.

A second consideration to keep in mind is that statements made in an informal procedure are not under oath. The director claims no monopoly on objectivity in presenting a summary of facts, but it is fairly clear that the presentations by persons potentially subject to monetary penalty carry no guarantee of objectivity.

Finally, some cases in the past have been characterized as "director versus individual" disputes. No part of Chapter 455B makes injury to specific persons a prerequisite to enforcement action. However, the Commission's concern for individuals to be referred should logically be extended to the persons affected by the violation, when those persons can be identified. Those affected individuals, if they wish to appear before the Commission, will have to do so at their own expense. The Commission should not be surprised when these individuals do not travel to Des Moines, especially when they have a legitimate expectation that Department director will pursue violations.

PROCEDURE

I. Litigation Report

- A. When the director desires to seek Commission referral of a case, the director will provide a litigation report presenting the relevant facts and applicable law. The report will include a confidential section, which will apply the penalty policy.
- B. Director will submit the litigation report to the Attorney General's Office for its review of the discussion of proposed settlement terms, and will provide that Office at least one week for the review, absent exigent circumstances.
- C. Following review by the Attorney General's Office, the entire litigation report and any comments from the Attorney General's Office will be sent to the Commission with, but not in, the monthly agenda package.

II. Notice to Affected Persons

- A. The director will give notice of a proposed referral to the individual or entity to be referred. The notice to the alleged violator will be sent by certified mail at least ten days prior to the date the Commission is scheduled to consider the case for referral, absent exigent circumstances. The Commission will determine whether exigent circumstances justify shorter notice to the alleged violator.
- B. The director will also attempt to provide reasonable notice to known persons who claim to be, or are believed to be, affected by the violation.
- C. Once notice is sent to the alleged violator, the director will not grant any request for delay. The director will notify the Commission of the request and will make a recommendation regarding granting of a delay.

III. Presentations to the Commission

- A. The director will make the initial presentation. The relevant facts known to the director and the applicable law will be presented and discussed. A representative of the Attorney General may be requested to attend. The Commission will attempt to schedule all enforcement matters consecutively on the agenda so that the time the Attorney General's representative must attend the meeting is minimized.
- B. After the director's presentation, the alleged violator or their representative will have the opportunity to respond to that presentation.
- C. After the alleged violator's presentation, complainants and other interested persons will have the opportunity to address the Commission.

- D. The chairperson of the Commission will preside during the presentation, and may set time limits on any presentation. Rebuttal of presentations, and questions to those persons making presentations by anyone other than Commission members, will be permitted in the discretion of the chairperson.

IV. Penalties

- A. Application of the penalty policy (attached) to the facts of a particular case will not be discussed in open session, because the application of the policy establishes a range of penalties in which an offer of settlement by the violator would be accepted, and therefore is part of the strategy in imminent litigation.
- B. Application of the penalty policy may be discussed in closed session, with the Commission, director, and representative of the Attorney General present.

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Penalty Policy

This penalty policy applies to those cases brought to the Commission by the director with the recommendation that they be referred to the Attorney General's Office for official legal action. This is a small part of the Department's overall enforcement policy. The objective of this penalty policy is to give the Commission, the Attorney General's Office, and the director a precise idea of how penalties should be determined. Once a target settlement figure has been reached and the Commission has voted for referral, the Attorney General's Office may enter into negotiations with the violator with the understanding that the approved penalty figure is a target or it may be described as a range. Actual settlements may be above or below the target settlement figure. The target settlement figure is not binding on the Attorney General's Office but a good faith effort will be made on their part to settle cases close to that figure. However, it is understood that many factors may ultimately affect the settlement of a lawsuit. At the time of referral the Attorney General's Office has made no independent investigation and must base its determinations solely on the director's litigation report. These factors may cause the actual settlement to differ from the target figure; however, when this happens the Attorney General's Office will consult with director prior to a settlement and will consider the Commission's views as expressed at the time of the referral. The Attorney General's Office will subsequently advise the Commission of their reasons for settlement in these cases.

This policy has no effect upon the Department's attempts to gain voluntary compliance. Only a very few of the violations which director discovers are brought to the Commission for referral. It is the Commission's intention that reasonable efforts should be made by the director to gain voluntary compliance first. It is also the Commission's intention that administrative penalties be assessed prior to referral to the Attorney General of minor violations, after reasonable efforts are made to obtain voluntary compliance.

When the director is considering recommending a case for referral, it will first determine which of the five following methods will be used for determining penalties to be used in negotiated out-of-court settlements. They are:

1. Four factors weighted at 30%-30%-30%-10%;
2. Economic savings to the violator exceeding the 30% factor;
3. Repeated violations;
4. Cases with unusual settlement target figures;
5. Cases that don't fit any of the above.

- I. The four factors approach will be used unless it appears inappropriate to the case being considered. The four factors are (1) gravity of the violation, (2) culpability of the violator, (3) economic savings, and (4) aggravating or mitigating circumstances. The first three factors will be assigned 30% per factor and the last factor will be 10%. These percentages pertain to the maximum penalty allowed under the Code.

This policy would work by first determining the maximum penalty which is allowed under the Code. The maximums are:

1. Solid waste is \$500 per day;
2. Water rights and floodplain are \$500 per day.
3. Air quality is \$5,000 per day;
4. Water quality is \$5,000 per day unless negligence or willfulness is involved when it increases to \$10,000 per day;
5. Hazardous waste is \$1,000, \$10,000, or \$25,000 per day depending on the type of violation.

Let's pick a hypothetical case and follow it through the four factors. Our case will be an air quality violation with a maximum penalty of \$5,000 per day. Our case involves a single day of violation.

The director would make an assessment as to the gravity of the violation. Since 30% of the overall settlement target will pertain to this factor the maximum that could be assessed is \$1,500 (30% of \$5,000). We would examine the case and in particular look at several sub-factors which would enable us to arrive at a decision as to what portion of the \$1,500 should be assessed. Such subfactors as harm to the environment would be examined. If this violation threatened the public safety as well as the environment, we might decide that the entire \$1,500 should be assessed.

Another sub-factor that we would consider is the extent by which the violation exceeds the applicable standards. For instance, if we allow power plants to discharge .6 of a pound of particulates per million BTU's and this plant is discharging 60 pounds, then we would regard that as a serious violation deserving the entire 30% of \$5,000. If that same plant was discharging 1 pound, we would probably assess something substantially less than the full 30%.

Once the director has arrived at a figure for gravity of the violation, we would turn our attention to culpability and begin the same process to determine how much of the \$1,500 (30% of \$5,000) should be assessed. The sub-factors which we will consider include the intent of the violator, was this a repeat violation, was it willful or negligent and what is the legal responsibility of the violator. If the violator is under a prior consent order or has a permit or has an administrative order then clearly there is an additional legal responsibility on their part to abide by our rules. If the violator clearly has prior knowledge that this action is a violation of our rules, then their culpability is increased. After weighing these sub-factors, the director would then decide which portion of the \$1,500 (30% of \$5,000) should be assessed.

- The third factor which is weighted as 30% is the economic savings which the violator has gained from the violation. The director will calculate the savings and apply that calculation against this factor, so that whatever a violator saves economically will be assessed up to a maximum of \$1,500 unless the economic savings to the violator exceeds 30% of the maximum penalty.

Aggravating or mitigating circumstances will be determined as 10% of the maximum which is \$5,000. This means that the maximum that could be assessed for this factor would be \$500 (10% of \$5,000). The sub-factors to be considered would include cooperation after the violation has been brought to the facility's attention and any efforts taken to insure that the violation will not be repeated. Any actions taken by violators to exercise their legal remedies will not be penalized. If unusual aggravating or mitigating circumstances are encountered, the case would be handled under the last of the five methods.

Once the penalty for each factor is decided, then those penalties will be totaled to give the director a settlement target figure.

- II. The four factors will be used in most cases. However, there are several overriding considerations which may modify the four factors approach. The first overriding consideration is if the economic benefit derived by the violator exceeds 30% of the maximum. Since no one should profit or gain a competitive advantage from violating the Code of Iowa or our rules, these cases should not be settled for something significantly less than the actual savings to the violator. Therefore, if the economic benefit is determined to be significantly higher than 30% of the maximum penalty, that monetary figure would become the minimum and the other factors - gravity of the violation, culpability, and aggravating or mitigating circumstances - could be figured and added to the economic benefit up to the maximum allowable penalty. So if an air facility derived a savings of \$3,000 or double the \$1,500 (30% of \$5,000) which we would have assessed under the four factors, we would start with \$3,000 and add dollars to that figure for the other factors.

- III. Another overriding consideration would involve repeated violations. If the violator has a series of violations, particularly if the department has in some fashion communicated its concern and requested or ordered the violations to cease, or assessed administrative penalties, then the penalty for subsequent violations will never be less than the initial penalty. In all situations involving a series of continued violations, the size of the penalty should show an upward progression until the maximum allowed under the Code is reached.
- IV. If the settlement target appears to be inequitable or unusual then the director should note this to the Commission and remove the case from all other penalty approaches substituting the director's best judgment which would be explained to the Commission.
- V. Finally, it is conceivable that a case would arise which does not fit any of the penalty approaches. Again, the director would exercise judgment as to an appropriate penalty and provide the Commission with an explanation. In these situations, the Attorney General's February 17th, 1982, proposed penalty policy may be used.

The director and the Attorney General's Office may meet at any time to evaluate implementation. Any modifications will be agreed upon and brought before the Commission for their approval. In the interim, any significant problems encountered will be addressed as they occur. This policy may be terminated by either the Commission or the Attorney General's Office at any time.

The purpose of this policy is not to lock anybody into an unworkable policy. The overriding considerations are designed to provide flexibility so that the Commission and the Attorney General's Office can effectively deal with those situations in the best interests of the citizens of Iowa.

Finally, if a negotiated settlement is not obtained and the case goes to trial, the Attorney General's Office is not bound by the settlement target figure. It is the Attorney General's practice to seek the maximum penalty and allow the judge to determine what is an appropriate penalty. The reason for this practice is that the legislature pursuant to the requirements of Federal law, has vested the courts with the discretion to choose the appropriate penalty up to the statutory maximum.

Adopted at the 10/27/86 EPC meeting.

ENVIRONMENTAL PROTECTION COMMISSION

NAME	COMPANY OR AGENCY	CITY
(Please print)		
TIM ROLLINGEN	IOWA PUBLIC SERVICE	Sioux City IA
JACK SOENER	IA ASS'N BUSINESS & INDUSTRY	D. M.
ROBERT WATTHAM	AMANA REFRIGERATION INC	AMANA
HANNA LORTE	"	"
MARJORIE DENNISON	CEDAR RAPIDS GAZETTE	D.M. BUREAU
Keith Cherry		
Keith Cherryholmes	Hygienic Lab	Iowa City
Lynn Gockel	Hygienic Lab	Iowa City
David Meyer	Dept. of Management	
Cindy Hildebrand	Iowa Audubon Council	Omes
Don Torrey	Iowa County Engrs. Assoc.	Marengo
Gene R. Hardy	Iowa County Eng. Assoc	Adel
STEVE CONWAY	SENATE DEMOCRATIC CAUCUS	D.M.
Bea Sandburg	IA Dept of Agriculture	DSM
Robert Andersen	Iowa Wildlife Fed	DSM
Robin Fortney	Iowa Power & Light Co.	DM